Supreme Court, U.S.
FILED

94 582 SEP 20 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner

v.

GENERAL DYNAMICS, FIRST INTERSTATE SERVICES COMPANY, ISUZU MOTORS AMERICA, INC.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD

PETITION FOR WRIT OF CERTIORARI

Shong-Ching Tong
1741 Phillips Dr.
Pomona, CA 91766
(909) 622-6884

Petitioner Pro Se

28 pp

QUESTIONS PRESENTED

1. May the California Workers' Compensation Appeals Board ignore the California Labor Code Section 5703.5's provision not to appoint or select Independent Medical Examiner when physicians' opinions are conflict with each other?

2. May the California Workers' Compensation Appeals Board distort, misrepresent, and misstate facts in its opinion and decision?

3. May the California Workers' Compensation Appeals Board refuse to let petitioner obtain a copy of the Court Reporter's Trial Transcript?

4. May the California Workers' Compensation Appeals Board adjudicate that the petitioner was not injured on the job while awarding 80th percentile medical-legal costs?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Shong-Ching Tong prays that a Writ of Certiorari issue to review the Joint Findings and Order of the California Workers' Compensation Appeals Board (WCAB) issued on September 8, 1993. Said Order was affirmed by the California Court of Appeal, Second Appellate District, Division 7 on May 3, 1994 and by the California Supreme Court on June 22, 1994.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the parties shown in the caption of this case, Shong-Ching Tong, General Dynamics, First Interstate Services Company, and Isuzu Motors America, Inc..

OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division 7, effectively affirmed the Joint Findings and Order of

the California Workers' Compensation Appeals Board by denying petitioner's "Petition for Writ of Review" in its order (Appendix A) on May 3, 1994.

The California Supreme Court denied a Petition for Review (Appendix B).

The California Workers' Compensation Appeals Board in its Joint Findings and Order awarded 80th percentile legal-medical costs to petitioner while adjudicating that petitioner was not injured on the job (Appendix C).

JURISDICTION

The California Supreme Court denied the Petition for Review on June 22, 1994. The petitioner invokes this certiorari jurisdiction under 28 U. S. C. Section 1257(3). Petitioner argued below that the California Workers' Compensation Appeals Board's Joint Findings and Order and Opinion and Decision would

violate his rights under both the California and the United States Constitutions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION, Amend. XIV, Sec. 1:

Amendment XIV, Section 1 to the United States Constitution is set forth in Appendix G.

CALIFORNIA LABOR CODE SECTIONS 4061, 4062, 5313, and 5703.5:

California Labor Code Sections 4061, 4062, 5313, and 5703.5 are set forth in Appendix G.

STATEMENT OF THE CASE

Petitioner Shong-Ching Tong ("TONG") filed Workers' Compensation claims in the underlying matter in the California Workers' Compensation Appeals Board in 1987, 1988, and 1990 while TONG was employed by Respondents General Dynamics, First Interstate Services Company, and Isuzu Motors America, Inc..

The claims were consolidated for trial on October 27, 1992 and June 14, 1993. On June 14, 1993, the Respondents were represented by Counsel and TONG appeared in Pro Per.

On June 14, 1994, the Workers' Compensation Judge, Brian P. McGovern, took the matters under submission after the Judge:

1. refused to let TONG's witness, Harry Hicks, testify for TONG (Appendix D); and

2. continued the trial while TONG was waiting at the WCAB's Lobby for his Counsel to arrive at the Hearing Room and became ill after the Judge ordered a hearing re imposing contempt of court charges and monetary sanctions of $1,000 against TONG.

On September 8, 1993, the WCAB's Joint Findings and Order was issued. In WCAB's findings, the Judge had picked and chosen the evidence and had not truly stated the facts.

Because the Joint Findings and Order

issued by WCAB are: (1) contradictory to each other, (2) in violation of California Labor Code Sections 5703.5 picking and chosing the evidence and witness, and (3) in violation of California Labor Code Section 5313 after WCAB failed to make and file its Findings within 30 days as mandated, TONG now seeks relief by the United States Supreme Court.

GROUND FOR INVOKING THE JURISDICTION OF THIS COURT

(i) Dated of Entry of the Joint Findings and Order and Opinion and Decision sought to be reviewed:

September 8, 1993.

(ii) Date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for a Writ of Certiorari:

None.

(iii) Express reliance upon Rule 12.3 when a Cross-Petition for a Writ of Certiorari is filed under that Rule and the date of receipt of the petittion for a writ of certiorari in connection with which the cross-petition is filed:

Not applicable.

(iv) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari:

Title 28 United States Code, Section 1257.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Section 1.

California Labor Code Sections 4061, 4062, 5313, and 5703.5.

REVIEW OF JUDGMENT OF A STATE COURT

Please see above and Appendix C.

REVIEW OF A JUDGMENT OF A UNITED STATES COURT OF APPEALS

Not applicable.

REASONS FOR ISSUING THE WRIT:

1. The California Workers' Compensation Appeals Board had ignored the Provisions of California Labor Code Section 5703.5 to appoint or select an Independent Medical Examiner

("IME") to evaluate TONG's claims when medical opinions are in conflict among TONG's and Respondents' physicians. In the instant case, the WCAB adapted reports written by Respondents' physicians and ignored reports written by TONG's physicians. The Judge's action was in violation of the holdings in Garza v. Workers' Comp. App. Bd. (1970) 3 Cal.3d 312 and in Phillips v. WCAB, M & H Construction Co. (1992).

2. The WCAB had violated provisions of California Labor Code Section 5313 when it failed to make and file findings upon all facts involving the controversy and award within 30 days as mandated.

3. The WCAB had repeatedly refused to allow TONG's witness to testify during the trial on June 14, 1993.

4. The WCAB had repeatedly refused to allow TONG to obtain a copy of the Reporter's

Transcript, which would show the Judge's bias and prejudices toward petitioner during t he trial on June 14, 1993.

5. The Appellate court had ignored evidence and facts showing the Judge had mis-stated, distorted, and misrepresented facts in his Opinion and Decision.

In the instant case, the WCAB had ignored provisions of California Labor Code Sections 4061, 4062,and 5703.5 when it failed to appoint or select Independent Medical Examiner to resolve the conflicts in the medical reports submitted by TONG's and Respondents' physicians.

Moreover, the WCAB should not pick and choose evidence and facts in order to support its findings.

CONCLUSION

For the reasons set forth above, Petitioner Shong-Ching Tong prays that the Court will issue its Petition for Certiorari

to the California Workers' Compensation Appeals Board to review its September 8, 1994's Joint Fondings and Order that TONG was not injured on the jobs.

September 16, 1994

Respectfully submitted,

Shong-Ching Tong

Shong-Ching Tong
Petitioner Pro Se

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 7 DATE: 05/03/94

Shong-Ching Tong
1741 Phillips Drive
Pomona, CA 91766

RE: Tong, Shong-Ching
VS.
Workers' Compensation Appeals Board
2 Civil B081139
Los Angeles No. POM0124143

THE COURT:

The petition for writ of Review (w. c. a. b.) is denied.

Second Appellate District, Division Seven
No. B081139
S039875

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

SHONG-CHING TONG, Petitioner

v.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent

GENERAL DYNAMICS Et Al., Real Parties In
Interest

Petition for review DENIED.

SUPREME COURT
FILED
June 22, 1994

Robert Wandruff
Clerk

DEPUTY

LUCAS

Chief Justice

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No. POM 0124143, 0124144
POM 0138790, 0139690
POM 0179193

SHONG CHING TONG,	)	
	)	
Applicant	)	JOINT
	)	
vs.	)	FINDINGS AND ORDER
ISUZU MOTORS OF AMERICA;	)	
WAUSAU INSURANCE,	)	
FIRST INTERSTATE;	)	
GENERAL DYNAMICS;	)	
INSURANCE COMPANY OF	)	
NORTH AMERICA,	)	
Defendants.	)	
	)	

Shong Ching Tong in Propria Persona.

Zonni, Ginocchio & Taylor by Jack James, Attorney for defendants Wausau Insurance.

Parker & Irwine by John F. Parker, Attorney for defendant Insurance Co. of North America.

Ibold & Anderson by Michael I. Douglas, Attorney for defendant Truck Insurance.

* * * * *

Application having been filed herein:all parties having appeared and the above the matter having been regularly submitted, the

Honorable BRIAN P. McGOVERN, WORKERS' COMPENSATION JUDGE, now finds, and orders as follows:

FINDINGS OF FACT

1. SHONG CHING TONG, born August 28, 1935, was employed at various locations, as a Program Analyst by various employers.

2. Applicant did not sustain injury arising out of and occurring in the course of said employment to his various body parts as alleged herein.

3. Applicant is entitled to reimbursement of medical-legal costs at the 80th percentile. Parties are to adjust same with jurisdiction reserved in the event that they are not able to do so.

4. There are no funds from which to issue attorneys fees, this issue is moot.

5. All other issues are moot.

A W A R D

AWARD IS MADE in favor of SHONG CHING

TONG against WAUSAU INSURANCE. TRUCK INSURANCE and INSURANCE COMPANY OF NORTH AMERICA of:

(a) Reimbursement for medical-legal costs as provided in Finding No. 3 above. less credit for sums paid. if any..

O R D E R

IT IS. THEREFORE. ORDERED that applicant take nothing further herein.

DATED AT POMONA. CALIFORNIA

September 8. 1993

/S/

BRIAN P. McGOVERN
WORKERS' COMPENSATION
JUDGE

Served by mail on parties on the Official Address Record effected on above date.

BY: R VALDEZ

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF INDUSTRIAL ACCIDENTS

WORKERS' COMPENSATION APPEALS BOARD

SHONG-CHING TONG Applicant vs. GENERAL DYNAMICS, et al.. Defendants.	Case No. 88 POM 138790 and all related cases DECLARATION OF HARRY HICKS

DECLARATION OF HARRY HICKS

I. HARRY HICKS, declare:

1. I am over the age of eighteen and not a party to nor do I have proprietary interest in the above-entitled action. My business address is 6521 Quite Hours, Suite 102, Columbia, MD..

2. On June 14, 1993, at about 10:00 a. m.. I was called to be the applicant's witness at his WCAB hearing.

3. After I was sworn in by the Honorable Brian McGovern, Judge of Workers' Compensation Appeals Board (WCAB), Mr. Tong asked me questions concerning his wrongful termination case against GTE Data Services. Isusu Motors objected to many of Mr. Tong's questions and Judge McGovern often ruled in Isuzu's favor, striking his questions, despite the fact Isuzu Motors America, Inc. first raised the issue of the GTE Data Services case.

4. Soon thereafter, Judge McGovern threatened Mr. Tong with monetary sanctions and jail terms, and said a hearing for contempt of court would be held at 1:30 p. m.. The trial recessed.

5. Immediately after the recess, Mr. Tong called his attorney in preparation of the contempt hearing.

6. While Mr. Tong's attorneys were on their way to the Workers' Compensation Appeals

Board. Judge McGovern reconvened the trial in spite of Mr. Tong's objections. Mr. Tong sought to recuse Judge McGovern. Judge McGovern denied Mr. Tong's requests and Mr. Tong and I left the hearing room because Mr. Tong had become ill.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that if called upon I could and would testify competently thereto.

Dated: June 14. 1993

/S/

Harry Hicks

Shong-Ching Tong
1741 Phillips Dr.
Pomona, CA 91766

December 16, 1993

WORKERS' COMPENSATION APPEALS BOARD
971 Corporate Center Dr.
Pomona, CA 91768

RE: SHONG-CHING TONG v. GENERAL DYNAMICS.
Et Al.,
87 POM 124143: 87 POM 121144: 88 POM
138790: 88 POM 139690: POM 179193

ATTN: Renee Fasano

Dear Ms. Fasano:

I would very much appreciate your kindness if you would give me a copy of that portion of the Trial Transcript for the trial transcript for the trial held on June 14, 1993 before Judge Brian McGovern.

The Portion of the Transcript I need is from begining of the trial on June 14, 1993 to the time Judge McGovern continued the trial without me in the Courtroom.

I am goning to retain an attorney to represent me in my Workers' Compensation cases. The Trial Transcript for the trial held on June 14, 1993 will help the attorney to better understand of the proceedings in instant case.

Please bill me for the costs and expenses incurred as a result of my request.

Thank you for your immediate attention on my request. I am looking forward to hearing from you soon.

Very Truly Yours,

/S/
Shong-Ching Tong

Law Offices of
ROBERT M. SCHUCKER
222 North Mountain Avenue, Suite 201
Upland, California 91786

December 29, 1993

Hon. Robert Welch
Presiding Judge
Workers' Compensation Appeals Board
971 Corporate Center Drive
Pomona, CA 91768

Re: Shong-Ching Tong v. General Dynamics, et al.
87 POM 124143; 87 POM 121144; 88 POM 138790; 88 POM 139690; POM 179193

Dear Judge Welch:

This letter is written on behalf of Shong-Ching Tong, who appeared in Pro Per before the Board at trial of the above consolidated matter, on June 14, 1993.

Mr. Tong would very much like to obtain a transcript of the June 14, 1993 proceeding. Further, since he has asked my assistance in future Workers' Compensation cases, I suspect that a reporter's transcript of the June 14th trial may be critical to my understanding of it.

I understand that you must authorize the release of a reporter's transcript. May I therefore request that you grant the reporter permission to provide a transcript to Mr. Tong?

Your assistance is greatly appreciated.

Very respectfully,
/S/
Robert M. Schucker

U. S. CONSTITUTION. Amend. XIV. Sec. 1:

"All persons born or naturalizaed in the United States. and subject to the jurisdiction thereof. are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life. liberty or property. without due process of law: nor deny any person within its jurisdiction the equal protection of laws."

California Labor Code. Section 4061:

"(m) . . . . However. the testimony. records. and reports offered by the treating physician or physicians who treated the employee for the injury and comprehensive medical evaluations prepared by a qualified medical evaluator selected by an unrepresented employee from a three-member panel shall be admissible."

California Labor Code. Section 4062:

"(d) No disputed medical issue specified in subdivision (a) may be the subject of a declaration readiness to proceed unless there has first been an evaluation by the treating physician or an agreed or qualified medical evaluator."

"(e) . . . . Reports obtained in violation of this prohibition shall not be admissible in any proceeding before the appeal board. However. the testimony. records. and

reports offered by the treating physician or physicians who treated the employee for the injury shall be admissible."

California Labor Code, Section 5313:

"The Appeals Board or workers' compensation judge shall within 30 days after the case is submitted make and file findings upon all facts involving the controversy and award, the order or decision stating the determination as to the rights of the parties. Together with the finding, decision or award there shall be served on all the parties to the proceeding a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

California Labor Code, Section 5703.5:

"(a) The appeals board, . . . may, upon the agreement of a party to pay the cost, direct an unrepresented employee to be examined by a qualified medical evaluator selected by the appeals board, . . ."

(2)

94-582

Supreme Court, U.S.
FILED
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No. 94-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner,
VS.
ISUZU MOTORS AMERICA, INC.;
EMPLOYERS INSURANCE OF WAUSAU,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND POINTS AND AUTHORITIES

ZONNI GINOCCHIO & TAYLOR
A Professional Corporation
By: THOMAS E. HANDY
516 BURCHETT STREET
GLENDALE, CALIFORNIA 91203-1090
(818) 241-2141

Attorneys for Respondents,
Employers Insurance of Wausau;
Isuzu Motors America, Inc.

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

12 pp

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No. 94-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner,
vs.
ISUZU MOTORS AMERICA, INC.;
EMPLOYERS INSURANCE OF WAUSAU,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND POINTS AND AUTHORITIES

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Shong-Ching Tong Petitions this Court for a Writ of Certiorari for review on this matter following a Decision by the Supreme Court of the State of California that was filed on or about June 22, 1994. Respondent, Isuzu Motors America, Inc. and Employers Insurance of Wausau, in answer to the Petition for Writ of Certiorari, allege and argue as follows:

I.

STATEMENT OF MATERIAL FACTS

Petitioner Shong-Ching Tong is seeking Writ of Certiorari to review the Joint Findings and Order of the California

Workers' Compensation Appeals Board, issued on September 8, 1993. Since the Court of Appeal of the State of California, Second Appellate District, Division 7, and the Supreme Court of the State of California, have appropriately reviewed the lower Court's Finding, Respondents will treat the Petitioner's Petition for Writ of Certiorari as seeking relief from the denial of the Petitioner's Petition for Writ of Review.

The Petitioner is seeking review of the denial of his Petition for Writ of Review essentially solely on the grounds that it was adverse to his interests.

At no time has Petitioner asserted that the Decision was not supported by substantial evidence.

Petitioner filed five different cases before the Workers' Compensation Appeals Board against three separate employers. Testimony was partially completed on October 27, 1992. At that Trial, Petitioner was represented by counsel. A further Trial was scheduled for March 9, 1993, at which time Petitioner was represented by counsel. However, the Petitioner asserted illness and did not appear, causing the Trial not to go forward.

On April 12, 1993, Petitioner dismissed his most recent attorney.

At the Trial of June 14, 1993, the Petitioner appeared In Propria Persona and called a witness, namely Harry Hicks, as a witness in his own behalf. Testimony was taken at the Trial on June 14, 1993, including completion of the cross-examination of the Petitioner by defense counsel.

Contrary to the Petitioner's assertions, at no time did he advise the Workers' Compensation Judge or defense counsel at the time of the June 14, 1993 Trial that he was ill. Following his departure, Petitioner was advised on two or three separate occasions that testimony was continuing and

that he should be present in the hearing room as the trial was proceeding to conclusion.

The Workers' Compensation Judge issued his Findings of Fact that the Petitioner did not sustain an injury arising out of and occurring in the course of his employment. The Judge in his Opinion on Decision, as well as his recommendation on Petition for Reconsideration, indicated that he did not find the Petitioner's testimony to be credible.

The Workers' Compensation Judge relied upon medical opinions which found that the Petitioner's problems were not related to his employment with any of the three named employers.

Petitioner filed a Petition for Reconsideration. The Petitioner failed to serve any of the defendants in this case with a copy of his Petition for Reconsideration. Nevertheless, the Workers' Compensation Appeals Board issued an Order denying the Petitioner's Petition for Reconsideration, and adopted the Opinion of the Workers' Compensation Judge. The Petition then filed a Petition for Writ of Review, which was denied on May 3, 1994.

II.

THE PETITIONER HAS FAILED TO SHOW THAT THE UNITED STATES SUPREME COURT HAS JURISDICTION OVER THIS MATTER.

The Petitioner cites in his Writ for Certiorari the U. S. Constitution, Amendment XIV, Section 1. That Constitutional Amendment states that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of laws.

The Petitioner also cites 28 U.S.C. § 1257, which states that final judgments or decrees rendered by the highest court of a state in which a Decision could be had, may be reviewed by the Supreme Court of the United States by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question; or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or any title, right, privilege or immunities specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rule 10 of the Rules of the Supreme Court states that:

> "A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari must be granted only when there are special and important reasons therefor."

Illustrative of the character of reasons that will be considered include when a State Court of last resort has decided a Federal question in a way that conflicts with the Decision of another State Court of last resort or of a United States Court of Appeal; and when a State Court of Appeal has decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court; or has decided a Federal question in a way that conflicts with applicable Decisions of the United States Supreme Court.

The Petitioner has failed in his Petition for Certiorari to show that this case involves an important Federal question which would merit the consideration of the United States Supreme Court. The Decision of the Supreme Court of the State of California to deny the Writ of Review does not draw into question the validity of a statute of the United States. The Petition for Writ of Certiorari does not draw in

question the validity of a statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The Petition also fails to show where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or the statutes of, or any commission held or authority exercised under the United States. Petitioner's reference to the XIV Amendment to the Constitution is not supported by any evidence presented to date which would show that the Petitioner was denied due process of law.

III.

PETITIONER ADDED NEW ISSUES IN HIS PETITION FOR WRIT OF CERTIORARI WHICH HE DID NOT BRING UP IN HIS PETITION FOR REVIEW OF THE APPEALS BOARD DECISION.

The Petitioners' Petition for Reconsideration before the Workers' Compensation Appeals Board raised one issue only: that reconsideration should be granted for the purpose of obtaining an independent medical examination. Petitioner raised in his Petition for Writ of Review with the Supreme Court of the State of California, and in his Petition for Writ of Certiorari with the United States Supreme Court, additional issues which were not raised in the Petition for Reconsideration or in the Petition for Writ of Review filed with the California Court of Appeal. Pursuant to California Rules of Court, Rule 29, the State Supreme Court is restricted from considering any issue that could have been, but was not timely raised in the briefs filed in the Court of Appeal. Labor Code § 5904 also provides that the Petitioner for reconsideration shall be deemed to have waived all objections, irregularities and illegalities concerning the matter upon which the reconsideration is sought, other than those set forth in the Petition for Reconsideration.

In the Petition for Writ of Review filed with the Supreme Court of the State of California, the Petitioner raised the issue of fraud in the procurement of the Decision and the issue of the allowance of medical/legal costs. Since the Petitioner was barred from bringing up new issues at the level of the Supreme Court of the State of California, it is clear that the Petitioner may not be present these new issues before the United States Supreme Court, when it failed to present such issues in the Petition for Reconsideration and in the Petition for Writ of Review with the State Appellate Court.

IV.

THE APPEALS BOARD DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

It was held in the case of *Levesque v. WCAB*, 1 Cal.3d 627 (1971), that the review by the Courts should not be extended further than to determine, based on the entire record, whether the Order, Decision or Award was not supported by substantial evidence. Respondents submit that the Order Denying Reconsideration and the denial of the Petition for Writ of Review were based upon the entire record; most particularly, the trier of fact's determination of the credibility of the witnesses.

The Workers' Compensation Judge on numerous occasions, stated that he did not find the Petitioner to be a credible witness. In his Opinion and in his Recommendations Upon Reconsideration, the Workers' Compensation Judge made it quite plain that he found the Petitioner's testimony not to be credible. Clearly, his judgment was based upon his observations of the witness' demeanor over the course of trial on two different dates. The Respondents submit that the opinion of the Workers' Compensation Judge regarding the credibility of the applicant must be

given the great weight it deserves (*Garza v. WCAB*, 3 Cal.3d 312 1970)).

The Petitioner requests the appointment of an independent medical examiner due to the conflicting medical evidence. However, it is well established in Workers' Compensation law that the opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence upon which the Workers' Compensation Judge may rely (*Place v. WCAB*, 3 Cal.3d 378, 90 Cal.Rptr. 424 (1970); *Patterson v. WCAB*, 3 Cal.3d 916, 126 Cal.Rptr. 182 (1975)).

While it is correct that the Appeals Board may within its discretion appoint an independent medical examiner, the Petitioner has requested in his Petitions for Writ of Review and in his Petition for Writ of Certiorari, that the courts at the appellate level apply judgment in an area of discretion which is reserved for the Workers' Compensation Appeals Board.

V.

CONCLUSION

The Order denying reconsideration of the Workers' Compensation Appeals Board, and the denial of the Petitioner's Petition for Writ of Review by the State Appellate Court and Supreme Court are based upon substantial evidence, which is made clear when the entire record is reviewed and the sequence of events is analyzed in conjunction with the Petitioner's testimony and the entire medical record. The Petitioner testified at time of Trial, and his testimony was found not to be credible by the trier of fact. The Petitioner had been represented by counsel until the last day of Trial, when he voluntarily dismissed his counsel. Petitioner's belated claim of illness is clearly self-serving. At no time has the Petitioner claimed that the Decisions were not supported

by substantial evidence; he merely asserts that it was unfair for the Appeals Board not to exercise its discretion to appoint an independent medical examiner. Finally, the Petitioner has failed to show that the United States Supreme Court has jurisdiction over this matter.

WHEREFORE, Respondents pray that the Petition for Writ of Certiorari be summarily denied.

Respectfully submitted this _____ day of October, 1994 in the County of Los Angeles, State of California.

ZONNI, GINOCCHIO & TAYLOR
A Professional Corporation

By: THOMAS E. HANDY
Attorneys for Respondents,
Isuzu Motors America, Inc;
Employers Insurance of Wausau

VERIFICATION

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

Under penalty of perjury I declare the truth of the following:

I am the attorney for Respondents ISUZU MOTORS AMERICA INC. and EMPLOYERS INSURANCE OF WAUSAU; I have read the foregoing Answer to Petition for Writ of Certiorari and Points and Authorities and am informed and believe the same is true and on that ground allege that the matters therein stated are true and correct; and that I make this verification because the facts set forth in said Answer are within my knowledge and because as attorney for Respondents, I am more familiar with such facts.

Executed this 13th day of October, 1994 at Glendale, California.

/s/ THOMAS E. HANDY
THOMAS E. HANDY

No. 94-582

Supreme Court, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner,

vs.

GENERAL DYNAMICS, FIRST INTERSTATE SERVICES COMPANY, ISUZU MOTORS AMERICA, INC.,
Respondents.

BRIEF FOR RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PARKER & IRWIN
A Professional Corporation

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No. 94-582

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner,

vs.

GENERAL DYNAMICS, FIRST INTERSTATE SERVICES COMPANY, ISUZU MOTORS AMERICA, INC.,

Respondents.

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COME NOW Respondents, General Dynamics Data System Division and its workers' compensation carrier, Insurance Company of North America, in response to the Petition for Writ of Certiorari which was filed by Shong-Ching Tong as Petitioner in propria persona.

Respondents received notification pursuant to Rule 12.1 that the Writ of Certiorari was filed on September 20, 1994.

PRELIMINARY STATEMENT REGARDING JURISDICTION

Petitioner initially filed a Petition for Reconsideration before the Workers' Compensation Appeals Board (WCAB) arguing that reconsideration should have been granted for the purposes of obtaining an independent medical examination at the time of Petitioner's workers' compensation case. The single issue raised in the Petition for Reconsideration was that reconsideration should have been granted for the purpose of obtaining independent examination. Petitioner's Petition for Reconsideration was denied.

Petitioner then filed a Petition for Writ of Review before the California Court of Appeal which raised the single issue

that the WCAB had the authority to appoint a qualified medical examiner (QME) in the case of an unrepresented employee. Petitioner's Petition for Writ of Review was summarily denied by the Court of Appeal on May 3, 1994.

Petitioner then filed a Petition for Review before the California Supreme Court which raised additional issues which had not been raised in the Petition for Reconsideration or in the Petition for Writ of Review. Pursuant to the California Rules of Court, Rule 29, there is a limitation on the grounds for review in the Supreme Court. Subparagraph (b) of Rule 29 states in relevant part, "As a matter of policy, on petition for review, the Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;..." The Supreme Court summarily denied Petitioner's Petition for

Review on June 22, 1994.

Petitioner has now petitioned for Writ of Certiorari before the United States Supreme Court. He has once again raised issues which were not raised in the proceedings at the state level. In addition, he has not set out any federal question or based his appeal on any federal statute or on the United States Constitution thereby establishing jurisdiction for his Petition to be heard by the United States Supreme Court. Petitioner has cited Amendment XIV, §1, of the United States Constitution apparently as the basis for jurisdiction before your Honorable Court. That Amendment states in part that no state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any

person within its jurisdiction the equal protection of laws.

At no place in his Petition for Writ of Certiorari has Petitioner in any way indicated how the Fourteenth Amendment of the United States Constitution has been violated. Petitioner makes no argument regarding the privileges or immunities section of the United States Constitution. Petitioner makes no argument as to how he was deprived of due process of law. Petitioner makes no argument as to how he was deprived of the equal protection of laws. He has merely set forth in the Appendix Amendment XIV and he has evoked that Amendment as a jurisdictional basis for his Petition. His Petition, however, actually re-argues the same law, both case law and statutory law, which determined the state opinions. All of the law argued is California statutory law and California case law. He does not make any argument

whatsoever that any of the California law as applied or as written violates the United States Constitution in general or more particularly violates the Fourteenth Amendment.

Petitioner has also raised issues which were not raised in his Petition for Reconsideration and his Petition for Writ of Review. In his Petition for Writ of Certiorari, Petitioner has essentially reiterated what he argued in his Petition for Review before the California Supreme Court although he has included for the first time reference to the Fourteen Amendment. However, as already noted, he has made no arguments as to how the Fourteenth Amendment was violated in Petitioner's case.

California Labor Code §5904 states that, "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and

illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration."

Petitioner in his Petition for Review before the California Supreme Court raised the issue of fraud in the procurement of the decision and also raised other issues, such as the testimony of Harry Hicks, Labor Code §5313, medical-legal costs, and the finding that Petitioner did not have industrial injury. Petitioner had never raised these issues prior to raising them before the California Supreme Court which is in violation of California law.

Respondents allege that there is no merit in any of the contentions made by Petitioner in his Petition for Writ of Certiorari and that there is no reasonable basis, either jurisdictional or otherwise, for the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

The issues in this case are as follows:

1. Whether there was substantial evidence to support the Joint Findings and Order which issued from the Workers' Compensation Appeals Board.

2. Whether the Workers' Compensation Judge (WCJ) was required to appoint an impartial medical examiner under the circumstances of this case.

3. Whether there is any judicial basis whatsoever to have this matter heard by the United States Supreme Court.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Applications for Adjudication of Claim dated January 5, 1987, were filed on behalf of Petitioner by Attorney Barry M. Spencer of Stolzberg & Spencer, in two cases. In case 87 POM 124-143 injury was initially alleged to the psyche and in case 87 POM 124-144 injury was alleged to the low back.

Each of these Applications alleged injury over a period of time in the nature of a cumulative trauma. Ultimately the dates of said claimed injuries were claimed to be the period from May 9, 1984 through October 31, 1987, with injury alleged to the psyche, eyes and vision in one case and the back, eyes and vision in the other.

These cases were consolidated for trial with companion cases POM 138-790 and POM 139-690, pending against First Interstate Service Company and Truck Insurance Exchange, and POM 179-193 against Isuzu Motors of America and Wausau Insurance.

Testimony was taken and exhibits were received into evidence on two occasions - the first being October 27, 1992, at which time Petitioner was represented by the Law Offices of John C. Ellena - Attorney Kathryn Coutts appearing on that date. The trial was continued to March 9, 1993. Petitioner was represented by counsel at

the scheduled trial on March 9, 1993, but Petitioner, alleging that he was ill, did not appear at that trial.

Petitioner dismissed his attorneys on or about April 12, 1993.

The trial was completed on June 14, 1993, at which time Petitioner was representing himself.

A number of medical reports were obtained by the various parties. Petitioner obtained medical reports on his behalf while he was represented.

The consolidated cases were submitted for decision and the Joint Findings and Order issued on September 8, 1993. (See Petition for Writ of Certiorari, Appendix C-1.)

The WCJ, as required by Labor Code §5313[1], prepared and issued an Opinion on Decision. (Appendix 1)

Contrary to Petitioner's allegation, the WCJ did comply with Labor Code §5313 and set out the basis for his Findings and Order. The Opinion on Decision addressed injury in case number POM 0179193 which involved Petitioner's employment by Isuzu Motors. (Id., p. 1) The Opinion on Decision also addressed case numbers POM 0138790 and POM 0139690 which concerned Petitioner's employment at First Interstate Bank. (Id., p. 3) Finally, the Opinion on Decision discussed POM 014143 and POM

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[1] "§5313. Decisions of Appeals Board or workers' compensation judge.

The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

0124144 which concerned Petitioner's employment at General Dynamics. (Ibid)

The WCJ addressed injury arising out of and occurring in the course of employment (injury AOE/COE) in each of the cases. The WCJ stated, "The applicant was not felt to be the least bit credible in his testimony at trial regarding the alleged injuries he sustained..." (Id., p. 1) The WCJ relied upon the medical reports of Dr. Allen Engelberg dated January 20, 1989, Dr. Jack Vandernoot dated May 3, 1988, and Dr. Samuel Smith dated July 22, 1988 and stated that those reports were felt to be most persuasive on the non-industrial nature of Petitioner's claimed injuries. (Id., p. 2)

Petitioner filed an unverified Petition for Reconsideration from the Joint Findings and Order. (Appendix 2) The Petition for Reconsideration was not served on any of the adverse parties.

The WCAB denied the Petition for Reconsideration by its Order which issued on November 29, 1993. (Appendix 3) In connection with the Petition for Reconsideration, the WCJ prepared and filed his Joint Report and Recommendation on said Petition. (Appendix 4)

Petitioner filed a Petition for Writ of Review and Answers were filed by Respondents herein and also by Respondent Isuzu Motors and its workers' compensation carrier, Employers Insurance of Wausau. The Petition for Writ of Review was denied on May 3, 1994. (Petition for Writ of Certiorari, Appendix A-1)

Petitioner filed a Petition for Review and Answers were filed by Respondents herein and also by Respondent Isuzu Motors and its workers' compensation carrier, Employers Insurance of Wausau. The Petition for Review was denied on June 22, 1994. (Petition for Writ of Certiorari,

Appendix B-1)

ANSWERING ARGUMENTS WITH SUPPORTING POINTS AND AUTHORITIES

I

THE STATE COURTS CORRECTLY APPLIED THE LAW IN THIS CASE AND THERE IS NO FEDERAL QUESTION INVOLVED HEREIN AND NO VIOLATION OF THE UNITED STATES CONSTITUTION

The Petition being filed herein is not an appeal of right to your Honorable Court as such an appeal applies in cases in which a Federal Court of Appeals has declared a state statute to be invalid for violating the Constitution, federal Law, or a treaty. Also, appeal of right applies in the case where the highest court of a state has declared a federal statute or treaty to be invalid. In addition, if the State's highest court has upheld the validity of a state statute that was alleged to be unconstitutional or in violation of a federal statute or treaty, an appeal of right to the Supreme Court exists. None of

those reasons applies in the instant case.

As for a Petition for Writ of Certiorari, according to the Supreme Court's Rules, "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." (Rules of the Supreme Court, Rule 10.1) The case presented by Petitioner is not one that is special or involves important reasons for your Honorable Court to exercise its judicial discretion thereon.

Ordinarily, a party whose case has been at the highest level in a state system can appeal the case no further. In some few instances, however, a case appealed to the highest court of the state can be reviewed by the Supreme Court, but this is true only if the case involves a substantial federal question, such as the interpretation of the

U.S. Constitution or of a federal statute. The instant case does not involve a federal question. Moreover, Petitioner has not even alleged a federal question. In the instant case, the California Supreme Court did not decide this case on the ground that a federal statute or treaty was invalid nor did it hold a state statute valid despite the losing party's claim that the statute conflicted with the Constitution or laws of the United States. Indeed, Petitioner did not raise any federal issue during the state proceedings and should not be heard to do so at this stage.

Respondents contend that Petitioner did not in any way comply with Supreme Court Rule 14.1(h). That Rule provides in part:

> *"If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way*

in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

The record of the state proceedings establishes that the federal question was not timely or properly raised; indeed, the record shows that a federal question was not raised at all. Petitioner only now attempts to raise a federal question by simply citing, without more, Amendment XIV, §1, of the United States Constitution.

Respondents contend that only state court decisions resting on a dispositive federal ground are reviewable by the Supreme Court. And that review is ordinarily limited to the federal issue, as Murdock vs. City of Memphis 20 Wall. 590,

22 L.Ed. 429 (1875) illustrates. Moreover, under the review practice which has evolved, your Honorable Court will dismiss for lack of jurisdiction appeals from decisions resting on "adequate" and "independent" state grounds. In the instant case, the California proceedings and decisions below were based upon state statutes which pertain to the Workers' Compensation Laws of California. The Order of the California Supreme Court which denied Petitioner's Petition for Review in no way relied on the federal Constitution or any federal statute nor did it rely on any substantive grounds intertwined with federal ones. The California Courts involved herein construed the state statutes independently of any federal statutes and relied on state law to arrive at their decisions.

Based upon the fact that there is no federal question involved and that the

state decisions herein rested on adequate and independent state grounds, Petitioner's Petition for Writ of Certiorari must be dismissed.

II

THE AWARD OF MEDICAL-LEGAL COSTS IS NOT CONTRADICTORY TO THE FINDING THAT PETITIONER DID NOT SUSTAIN AN INDUSTRIAL INJURY

Under California law, an employee is entitled to be reimbursed by the employer for expenses reasonably, actually and necessarily incurred for x-rays, laboratory fees, diagnostic tests, medical reports, medical records, medical testimony, and, where needed, interpreters' fees for the purpose of proving a contested claim. (Labor Code §§4620, 4621(a); Uniroyal Goodrich Tire Company vs. WCAB (Hurt, Crowders) (1990) 55 CCC 259 (writ denied); State Compensation Insurance Fund vs. WCAB (Arroyo) (1977) 69 Cal. App.3d 884, 138

Cal.Rptr. 509, 42 CCC 394. The Arroyo case held that an employee was entitled to recover reasonable costs of medical reports of physicians, not licensed to practice in California, who treated the employee in Mexico.)

It is clear that medical-legal costs are awarded so long as the medical report is capable of proving or disproving a disputed medical fact, the determination of which is essential to an adjudication of the employee's claim. (Labor Code §4620(c)[2]) It does not make any difference whether the employee succeeds in proving his claim. The medical-legal expenses are allowed if they are incurred for the purpose of either proving or disproving a contested claim. The success of that contested claim is not a prerequisite for the award of medical-

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[2] Unless otherwise noted, all statutory references are to the California Labor Code.

legal costs.

In the instant case, the WCJ provided for the payment of the medical-legal costs pursuant to Labor Code §4624 which provides that the medical-legal reports shall be rebuttably presumed reasonable if the charges do not exceed the 80th percentile of fees in the appropriate specialties as established in Labor Code §4624(b). There is no inconsistency between Petitioner's "take nothing" Order and the award of medical-legal costs which were incurred to prove his contested claim.

III

THE TESTIMONY OF HARRY HICKS WAS PROPERLY EXCLUDED

Petitioner had filed a wrongful discharge case which had already been resolved at the time of the hearings in question which involved the remaining workers' compensation issues. Harry Hicks' testimony concerned Petitioner's claim that

he had been wrongfully discharged. As the WCJ stated in his Opinion on Decision, none of the questions that Petitioner asked of Harry Hicks "were relevant on the issue of injury arising out of and in the course of employment to the claimed body parts." (Appendix 1, p. 1) Consequently, the WCJ correctly found that the testimony of Mr. Hicks was not relevant on the issues being tried herein.

IV

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE WCJ'S FINDINGS

Respondents submit that the controlling aspect of this matter is the finding by the WCJ that the testimony of Petitioner was not credible. The California Supreme Court has stated that where the findings of the WCJ are supported by ample, credible evidence or substantial evidence they are entitled to great weight because of the Judge's opportunity to observe the witness'

demeanor and weigh their statements in connection with their manner on the stand. In re Branch (1969) 70 Cal.2d 200, 203, fn. 1, 74 Cal.Rptr. 238; Garza vs. WCAB (1970) 3 Cal.3d 312, 35 CCC 500, 505; see also Western Electric Company vs. WCAB (1979) 44 CCC 1145.

The findings and conclusions of the Appeals Board on questions of fact are conclusive and final so long as, based upon the entire record, they are supported by substantial evidence. LeVesque vs. WCAB (1970) 1 Cal.3d 627, 83 Cal.Rptr. 208. In the instant case, the WCJ stated that three of the medical reports, all submitted by Respondents in this case, were relied upon for the determination that Petitioner did not suffer an injury AOE/COE. "Factual determinations of the Board must be upheld if there is substantial evidence supporting them and the relevant and considered opinion of one physician, though

inconsistent with other medical opinions, constitute substantial evidence." Place vs. WCAB (1970) 3 Cal.3d 372, 35 CCC 525, 529. (See also Hulbert vs. WCAB (1975) 47 Cal.App.3d 634, 40 CCC 823, modification of 40 CCC 203.)

The Board is vested with the discretion to determine the persuasiveness of a medical report and the evidentiary weight given to it. McAllister vs. WCAB (1968) 69 Cal.2d 408, 416-417, 33 CCC 620. And if two rational inferences can be drawn from the record, one sustaining and the other opposing the sufficiency of a medical opinion, the conclusions of the Board must be affirmed. Hartford A & I Company vs. IAC (1927) 202 Cal. 688, 693, 14 IAC 288.

Based upon the cases cited above, the issue is not that the WCJ chose not to follow Petitioner's medical reports. The issue is whether the medical reports that the WCJ relied upon were, in fact,

substantial evidence to support the Findings and Order. The record shows that those reports were substantial evidence. Indeed, Petitioner offered no evidence whatsoever in the California proceedings that the medical reports relied upon therein did not constitute substantial evidence.

V

THERE IS NO BASIS FOR REFERRING PETITIONER TO AN IMPARTIAL MEDICAL EXAMINER

Considering that the WCJ in this case found that Petitioner's testimony was not credible, it would seem that the request by Petitioner that he be referred for further medical evaluation is moot. Without a factual, credible history on which to base a determination, referral to another medical examiner would be a waste of time.

In addition, there is no requirement under California law that the WCJ refer Petitioner to either an IME or QME.

Petitioner refers to Labor Code §§4061 through 4067. Those Labor Code Sections became operative on January 1, 1991 and are applicable only to injuries occurring on after January 1, 1990. Petitioner's alleged injuries occurred prior to the effective date of the Labor Code Sections cited by him. Moreover, Petitioner was not unrepresented at the time medical reports were being obtained. He had counsel up until just two months before the date of the last hearing. He was represented by counsel both at the date of the first hearing when testimony was taken and at the date scheduled for the second hearing which did not go forward because of Petitioner's alleged illness. He dismissed his attorney approximately two months before the last hearing and cannot now be heard to claim that he should get an impartial medical evaluation because he was unrepresented. All during the relevant times when medical

reports were being obtained, Petitioner was represented.

In Petitioner's Petition for Review filed with the California Supreme Court, there seemed to be a suggestion that special rules should apply to Petitioner because he was not represented by an attorney at the trial on June 14, 1993. However, there are no such special rules. Petitioner was representing himself by his own choice. The Applications in the cases against Insurance Company of North America were filed by an attorney. That attorney was later substituted out of the case and Mr. John C. Ellena then took over the representation of Petitioner. An attorney from the office of Mr. Ellena was in attendance at the trial of October 27, 1992, and Petitioner was still represented by attorneys up until two months before the final hearing on June 14, 1993. Petitioner's attorneys were substituted out

of the cases in April, 1993. It is submitted that Petitioner could have been represented by counsel if he wished. He chose not to be so represented and went forward on his own, as he has every right to do.

Petitioner also raised the issue of a reporter's transcript of the hearing of June 14, 1993. Respondents submit that the issue set forth in the Petition for Reconsideration and in the Petition for Writ of Review was so limited that a transcript would be of no value in deciding this case. As already noted, Petitioner only raised the issue of whether he should be sent to an IME or a QME. It is within the discretion of the Appeals Board to appoint an impartial medical evaluator. However, that discretion is reserved to the WCAB and there was no basis under the facts of this case for Petitioner to be referred to an impartial medical evaluator. There

were numerous reports in the file and the WCJ found three of the medical reports persuasive. Those reports were written by Drs. Engelberg, Vandernoot and Smith. Petitioner contended in the appeals filed during the California proceedings that there was a conflict in the medical evidence as set forth by Petitioner's reporting doctors and the reports of Respondents' reporting doctors. However, the WCAB is empowered to resolve conflicts in the evidence. Liberty Mutual Insurance Company vs. IAC (Serafin) (1948) 33 Cal.2d 89, 13 CCC 267.

CONCLUSION

Based upon the arguments set out above and based upon the points and authorities herein, Respondents, General Dynamics Data System Division and Insurance Company of North America, contend that the record in this case, when considered as a whole, supports the Joint Findings and Order of

the Workers' Compensation Judge; supports the Order Denying Reconsideration which issued from the WCAB; supports the denial of the Petition for Writ of Review which issued from the Court of Appeal; and supports the denial of the Petition for Review which issued from the California Supreme Court.

The California Courts properly followed California law in issuing their decisions. Petitioner has set out no argument whatsoever as to how or why the United States Supreme Court should take jurisdiction in this matter in that no federal statute was violated, no federal question was raised, and there was no violation of the United States Constitution.

There is no merit to any of Petitioner's arguments, many of which were raised for the first time in the Petition for Review before the California Supreme Court in

violation of California law. Based upon this record and the arguments herein, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated this 17th day of October, 1994, at Pomona, California.

Respectfully submitted,

PARKER & IRWIN
A Professional Corporation

By _____
JOAN E. PARTRITZ
Attorneys for Respondents

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Under penalty of perjury I declare the truth of the following:

I am the attorney for Respondents, GENERAL DYNAMICS DATA SYSTEM DIVISION and INSURANCE COMPANY OF NORTH AMERICA; I have read the foregoing Brief for Respondents and am informed and believe the same is true and on that ground allege that the matters therein stated are true and correct; and that I make this verification because the facts set forth in said Brief are within my knowledge and because as attorney for Respondents, I am more familiar with such facts.

Executed at Pomona, California, this 17th day of October, 1994.

JOAN E. PARTRITZ

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 300 South Park Ave., 9th Floor, Pomona, California 91766.

On October 17, 1994, I served the within Brief for Respondents on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Pomona, California, addressed as follows:

Supreme Court of the State of California, 300 S. Spring St., 2nd Fl., Rm. 2752, Los Angeles, CA 90013
Court of Appeal, Second Appellate Dist., Div. Seven, 300 S. Spring St., 2nd Fl., North Tower, Los Angeles, CA 90013
WCAB, P.O. Box 6759, San Francisco, CA 94101-6759 **WCAB**, 971 Corporate Center Dr., Pomona, CA 91768
Shong Ching Tong, 1741 Phillips Dr., Pomona, CA 91766
Zonni, Ginocchio & Taylor, P.O. Box 921, San Bernardino, CA 92402-0921
(Attorneys for Isuzu Motors of America)
Ibold & Anderson, 3580 Wilshire Blvd. 16th Fl., Los Angeles, CA 90010
(Attorneys for First Interstate Services)
Insurance Company of North America, P.O. Box 2228, Chatsworth, CA 91313-2228

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on October 17, 1994, at Pomona, CA.

Cheryl G. Pratt
CHERYL G. PRATT

Appendix 1

Opinion on Decision of Workers' Compensation Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
CASE NO. POM 0124143, 0124144
POM 0138790, 0139690
POM 0179193

ONG CHING TONG vs. ISUZU MOTORS OF AMERICA
WAUSAU INSURANCE
FIRST INTERSTATE
TRUCK INSURANCE
GENERAL DYNAMICS
INSURANCE CO. OF NORTH AMERICA

DGE: BRIAN P. McGOVERN

ATED: September 8, 1993

ong Ching Tong, in Propria Persona.

onni, Ginocchio & Taylor by Jack James, Attorney for defendants Wausau Insurance.

arker & Irwin by John F. Parker, Attorney for defendants Insurance Co. of North America.

old & Anderson by Michael I. Douglas, Attorney for defendants Truck Insurance.

* * *

OPINION ON DECISION

ASE NUMBER POM 0179193
NJURY AOE/COE

The applicant was not felt to be the least bit credible in his testimony at trial regarding the leged injuries he sustained while employed by Isuzu Motors as a Senior Program Analyst, see arza vs. WCAB 1970 35CCC 500, 505.

None of the applicant's questions that he asked his witness, Mr. Harry Hicks were relevant the issue of injury arising out of and in the course of employment to the claimed body parts.

Applicant was apparently set on re-litigating his alleged wrongful discharge of mployment case which evidently has been concluded. This was in no manner related to the ase in chief. The testimony at trial of Mr. Gary Curtis Gray was found to be most credible on he non-industrial nature of the applicant's alleged stress on the job.

The applicant has a multiplicity of outside non-industrial personal problems, including loss uits vs. other persons, for instance his brother for disillusion of a partnership, the oreclosure of his home, difficulty with a debt of $19,000.00 to Cathy Bank after a default udgement.

Accordingly, it is found that the applicant did not sustain injury arising out of and in the course of employment to his psyche, head, neck, back, internal, left hip and eyes, while in the employment with the defendants.

Additionally, the medical reports of Dr. Allen Engelberg dated January 20, 1989, Dr. Jack Vandernoot dated May 3, 1988, and Dr. Samuel Smith dated July 22, 1988 were felt to be most persuasive on the non-industrial nature of the applicant's claimed injuries.

APPORTIONMENT

In view of the non-industrial nature of this case the issue of apportionment is not relevant. However, it is noted that applicant has had many prior Workers' Compensation cases involving many of the same body parts.

FURTHER MEDICAL TREATMENT

The applicant is not entitled to further medical treatment in light of the non-industrial nature of his problems.

SELF-PROCURED MEDICAL TREATMENT

Self-procured medical treatment is hereby denied as being not due to the applicant's employment.

MEDICAL-LEGAL COSTS

The applicant is hereby allowed reasonable medical-legal costs at the 80th percentile. Parties are to adjust same with jurisdiction reserved in the event that they are not able to do so.

ATTORNEYS FEES

There are no funds from which to award attorneys fees, this issue is moot.

CASE NUMBER POM 0138790, POM 0139690
INJURY AOE/COE

For the same reason as stated in the Case Number POM 0179193, the applicant did not sustain injury arising out of and in the course of employment to his eyes, neck, throat and psyche as a result of his employment with First Interstate Bank, on March 31, 1988, additionally the medical report submitted by the applicant do not support an industrial condition to the applicant's eyes or psyche.

CASE NUMBER POM 0124143, POM 0124144
INJURY AOE/COE

It is found for the same reasons as set forth in Case Number POM 0179193, that the Applicant did not sustain an injury arising out of and in the course of his employment while employed by General Dynamics from May 9, 1984 through October 31, 1987 to his psyche, eyes, and vision.

BRIAN P. McGOVERN, JUDGE
WORKERS' COMPENSATION APPEALS BOARD

BPM: rv

cc Shong Ching Tong
Zonni, Ginocchio & Taylor
Parker & Irwin
Ibold & Anderson

Appendix 2

Petition for Reconsideration; Memorandum of Points and Authorities; Declaration of Shong-Ching Tong

Shong-Ching Tong
1741 Phillips Drive
Pomona, CA 91766
(909) 622-6884
Applicant, in Pro Per

STATE OF CALIFORNIA

WORKERS' COMPENSATION APPEALS BOARD

971 Corporate Center Drive #100, Pomona, CA 91768

SHONG-CHING TONG, Applicant, v. ISUZU MOTORS OF AMERICA, et al., Defendants.	CASE Nos. POM 0124143, 0124144, POM 0138790, 0139690, POM 0179193 PETITION FOR RECONSIDERATION; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SHONG-CHING TONG (Labor Code §5900 et seq.)

TO THE HONORABLE BRIAN P. McGOVERN, Workers' Compensation Judge:

COMES NOW the Applicant, SHONG-CHING TONG, in Propria Persona, and petitions for reconsideration of the Joint Findings and Order, dated September 8, 1993, in the above matters.

The petition is grounded on the applicant's belief that there was insufficient evidence to support the findings of fact, and insufficient findings of fact to support the decision.

The petition is based upon the records and files in these cases and upon the petition herein, including the accompanying memorandum of points and authorities and declaration of Shong-Ching Tong.

September 27, 1993

SHONG-CHING TONG
Applicant, in Pro Per

MEMORANDUM OF POINTS AND AUTHORITIES

I.

A WORKERS' COMPENSATION JUDGE'S FINAL ORDER MAY BE RECONSIDERED

"At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds and no other:

. . .

(c) That the evidence does not justify the findings of fact.

. . .

(e) That the findings of fact do not support the order, decision, or award.

. . . ."

- Labor Code §5903

II.

RECONSIDERATION IS APPROPRIATE FOR THE PURPOSE OF OBTAINING AN INDEPENDENT MEDICAL EXAMINATION

"Reconsideration for purpose of obtaining independent

medical evaluation in workers' compensation matter was justified on ground that evidence did not support findings, although finding of industrial causation was supported by aspects of each physician's opinion, where medical evidence was in conflict."

- Hall v. W.C.A.B. (2d Dist., 1986) 179 Cal.App.3d 850, 225 Cal.Rptr.56

"Where medical evidence, in workmen's compensation proceeding, was in conflict, workmen's compensation appeals board did not exceed its powers by granting employer's petition for reconsideration of referee's award to direct examination of injured employee by physician and to take additional evidence."

- Solomon v. Workmen's Compensation Appeals Bd. (1972) 24 Cal.App.3d 282, 100 Cal.Rptr. 899.

"Workers' Compensation Appeals Board has power to direct taking of additional evidence when it grants reconsideration."

- King v. W.C.A.B. (2d Dist., 1991) 231 Cal.App.3d 1640, 283 Cal.Rptr. 98.

Discussion

Findings of Fact #2 in the Joint Findings and Order, which the applicant seeks to have reconsidered, states,

"2. Applicant did not sustain injury arising out of and occurring in the course of said employment to his various body parts as alleged herein."

Conflicting medical evidence was presented to the Workers' Compensation Judge by the applicant and by the defendant employers, and it is the applicant's belief that Finding #2 resulted from such conflicting evidence.

In accordance with the authorities cited above, it would be appropriate for the Judge to grant reconsideration herein and to concurrently order an Independent Medical

Examination ("IME") of the applicant, and such is requested.

Respectfully submitted:

September 27, 1993

SHONG-CHING TONG
Applicant, in Pro Per

DECLARATION OF SHONG-CHING TONG

I, SHONG-CHING TONG, hereby declare that I am over the age of 18 years and a resident of Los Angeles County, California. My address and telephone number are: 1741 Phillips Drive, Pomona, CA 91766; (909) 622-6884.

I am the Applicant in the cases herein.

On June 14, 1993, the above matters came on for hearing before the Honorable Brian P. McGovern, Workers' Compensation Judge, at the Workers' Compensation Appeals Board's Pomona offices. The defendants and lien claimant were represented by counsel (at least four of them!), whereas I appeared by myself, in pro per. It is my contention that, in the ensuing four-against-one hearing, the defendants' counsel proceeded to "beat up" on me. I came under such stress that I became ill and could not proceed by myself, notwithstanding the Judge's orders to do so. I telephoned an attorney who had previously represented me in other matters but not in workers'

compensation cases, and asked him to come immediately to the hearing, in the hope that his presence could somehow defuse the tension in the courtroom. It was necessary for him to drive about 15 miles to the hearing, however, and by the time he arrived, the Judge had taken the matter under submission. The Joint Findings and Order of September 8, 1993 was subsequently issued without further hearing. It is this Joint Findings and Order which I respectfully seek to have reconsidered.

There has been no Independent Medical Examination in these cases. Since there was conflicting medical evidence before the Judge, it is my belief that Finding #2 of the Findings and Order is erroneous.

I declare under penalty of perjury that the foregoing is true and correct, except that which is stated on information and belief, and as to those matters, I believe them to be true.

Executed on September 27, 1993 at Pomona, California.

Shong-Ching Tong

SHONG-CHING TONG

/ / /

Appendix 3

Order Denying Reconsideration of Workers' Compensation Appeals Board

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHONG CHING TONG, *Applicant,* vs. ISUZU MOTORS OF AMERICA, WAUSAU INS.; TRUCK INS.; GENERAL DYNAMICS INS. CO. OF NOTH AMERICA. *Defendants,*	Case Nos. POM 0124143 POM 0179193 POM 0124144 POM 0138790 POM 0139690 ORDER DENYING RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

We are, moreover, extending to the WCJ's finding on credibility the great weight to which it is entitled (see Garza v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 312, 35 Cal. Comp. Cases 500).

We note, moreover, that it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (See Place v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 372, 35 Cal. Comp. Cases 525).

. . .

. . .

. . .

For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

J Wiegand

I CONCUR,

Richard P Gannon

Alan V. Heath

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

NOV 29 1993

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

vsr

Appendix 4

Joint Report and Recommendation on Petition for Reconsideration of Workers' Compensation Judge

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
CASE NO. POM 0124143, 0124144,
POM 0138790, 0139690,
POM 0179193

SHONG CHING TONG vs. ISUZU MOTORS OF AMERICA
WAUSAU INSURANCE
FIRST INTERSTATE
TRUCK INSURANCE
GENERAL DYNAMICS
INSURANCE CO. OF NORTH AMERICA

BRIAN P. McGOVERN
WORKERS' COMPENSATION JUDGE

DATE: October 13, 1993

Shong Ching Tong in Propria Persona.

Zonni, Ginocchio & Taylor by Jack James, Attorney for defendants Wausau Insurance.

Parker & Irwin by John F. Parker, Attorney for defendants Insurance Co. of North America.

Ibold & Anderson by Michael I. Douglas, Attorney for defendants Truck Insurance.

* * *

JOINT REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

I

INTRODUCTION

Petitioner/Applicant files a timely, but unverified Petitioner for Reconsideration received September 28, 1993, aggrieved by the Findings and Order which issued in this matter on September 8, 1993.

II

FACTS ON DISPUTED ISSUES

Petitioner/Applicant is seeking reconsideration of the Findings and Order dated September 8, 1993, which finds in part that the applicant did not sustain an injury arising out of and in the course of employment to the multiple body parts claimed.

III

DISCUSSION

Petitioner/Applicant's sole contention in his Petition for Reconsideration received September 28, 1993, is that this WCJ should have referred this matter out to Independent Medical Examiner. No such motion was made at the time of trial. An Independent Medical Examiner was not felt to be needed in this matter. The applicant was not felt to be the least bit credible in his testimony at trial, regarding the alleged injuries he sustained while employed by defendants as a senior program analyst, see Garza vs. WCAB, 1970, 35CCC, 500, 505.

IV

RECOMMENDATION

For the foregoing reasons, the Petition for Reconsideration filed by Petitioner/Applicant on September 28, 1993, and for the reasons set forth above, it is recommended that the Petition for Reconsideration be denied.

Brian P. McGovern

BRIAN P. McGOVERN, JUDGE
WORKERS' COMPENSATION APPEALS BOARD

BPM:rv

cc: Shong Ching Tong
Zonni, Ginocchio & Taylor
Parker & Irwin
Ibold & Anderson